
ASBURY PARK BOARD OF
EDUCATION, KEANSBURG BOARD OF
EDUCATION, PASSAIC BOARD OF
EDUCATION, PHILLIPSBURG BOARD
OF EDUCATION AND TRENTON
BOARD OF EDUCATION

Appellants

-v-

NEW JERSEY STATE DEPARTMENT
OF EDUCATION,

Respondent

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-840-03T5

ON APPEAL FROM: October 20, 2003
Decisions and Orders of the
Commissioner of Education
Docket Nos. 4095-03, 4195-03,
5499-03, 5501-03, 4093-03

BRIEF OF AMICUS CURIAE ABBOTT PLAINTIFFS

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PRELIMINARY STATEMENT

The Plaintiff-class of school children in the Abbott v. Burke case ("Abbott Plaintiffs"), through their counsel Education Law Center ("ELC"), seek leave pursuant to R. 1:13-9 to participate as amicus curiae in this appeal. The Abbott Plaintiffs are students in the schools and districts whose programs and budgets are the subject of this appeal. As such, they have a direct and substantial interest in the validity of the Department of Education ("DOE") regulation defining the maintenance budget for 2003-04, N.J.A.C. 6A:10-3.1(c), as challenged by Appellant Abbott districts.

The DOE, in adopting N.J.A.C. 6A:10-3.1(c), fundamentally altered the definition of maintenance budget established by the Supreme Court in its order of July 23, 2003 granting the DOE request to limit Abbott district budgets and supplemental funding for 2003-04. Abbott v. Burke, M-976, Order (July 23, 2003) ("Budget Order"). Rather than follow the Court's explicit instruction to include all 2002-03 approved programs in the maintenance budgets, DOE reduced those budgets by over \$120 million, including almost \$48 million in school-based programs, based solely on the unexpended amounts as of June 30, 2003 remaining in the districts' budget accounts.

As the Abbott Plaintiffs will demonstrate in this brief, the language in N.J.A.C. 6A:10-3.1(c) utilized by DOE to make these significant program reductions -- "approved and provided" -- is wholly inconsistent with the explicit terms and meaning of the Budget Order and is, therefore, unconstitutional.

PROCEDURAL HISTORY

The Abbott Plaintiffs incorporate herein the Procedural History set forth in Appellants' Brief in this matter.

STATEMENT OF FACTS

The Abbott Plaintiffs incorporate the Statement of Facts set forth in Appellants' Brief in this matter, and further supplement the record on appeal with the facts set forth in the Certification of David G. Sciarra ("Sciarra Cert.") filed in support of Plaintiffs' motion to participate as amicus curiae.

ARGUMENT

I. THE ABBOTT PLAINTIFFS SHOULD BE GRANTED LEAVE TO PARTICIPATE AS AMICUS CURIAE

The role of amicus curiae is to "assist in the resolution of an issue of public importance." R. 1:13-9. Such assistance may be rendered by "provid[ing] the court with information pertaining to matters of law about which the court may be in doubt," Keenan v. Bd. Of Chosen Freeholders, 106 N.J. Super. 312, 316 (App. Div. 1969), or by advising the court "of certain facts or circumstances relating to a matter pending for determination," Casey v. Male, 63 N.J. Super. 255, 258 (Essex Co. Ct. 1960). The participation of amicus curiae is particularly appropriate in cases with "broad implications," Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 80 N.J. 6, 17 (1976), or of "general public interest," Casey, 63 N.J. Super. at 259. See also Infocomp Corp. v. Somerset Trust Co., 165 N.J. Super. 382 (App. Div. 1979)(requesting that the attorney general file an amicus brief because the case presented an important question of public policy and statutory interpretation); State v. Maguire, 84 N.J. 508 (1980)(granting leave to appear as amicus due to public importance of the issues involved).

This appeal presents an issue of public importance regarding the fulfillment by DOE of its constitutional

obligation to provide Abbott Plaintiffs with a thorough and efficient education under the New Jersey Constitution. In particular, the appeal presents a critical question concerning DOE's adherence to the explicit constitutional directives of the Supreme Court in the Abbott v. Burke case, namely whether the DOE definition of maintenance budget in N.J.A.C. 6A:10-3.1(c) conforms to the definition established by the Court itself in the Budget Order issued on July 23, 2003.

The Abbott Plaintiffs have unique expertise in the question of the constitutional validity of N.J.A.C. 6A:10-3.1(c) before this Court. The Abbott Plaintiffs participated directly in the proceedings before the Supreme Court that resulted in mediation before the Honorable Philip S. Carchman, J.A.D., and in the July 23rd Budget Order granting DOE its proposed maintenance budget for 2003-04. The Abbott Plaintiffs also participated as amicus curiae in several of the present Abbott district appeals before the Office of Administrative Law, and filed a brief on the precise issue now before this Court. The Abbott Plaintiffs are clearly in a position to assist this Court in assessing the legal issues central to the disposition of this matter.

Additionally, participation by the Abbott Plaintiffs as amicus will not prejudice any party or delay these proceedings. Plaintiffs are simultaneously filing their certification and arguments on the merits at the same time as Appellants,

consistent with this Court's scheduling and case management order.

For these reasons, this Court should grant the Abbott Plaintiffs' request for leave to participate as amicus curiae.

II. N.J.A.C. 6A:10-3.1(c), BY NOT INCLUDING ALL APPROVED PROGRAMS, SERVICES AND POSITIONS IN 2002-03 IN THE DISTRICT MAINTENANCE BUDGETS, IS INCONSISTENT WITH THE SUPREME COURT'S JULY 23, 2003 ABBOTT BUDGET ORDER

On August 23, 2003, the DOE, by emergency regulation promulgated by Commissioner of Education, defined maintenance budget as one that "contains only those programs, positions and services approved and provided in 2002-03." N.J.A.C. 6A:10-3.1(c)(emphasis added). The DOE then applied this regulatory language in reviewing district 2003-04 budgets, reducing those budgets by over \$120 million in previously approved programs, services and positions solely on the basis that the funds to support such programs were unexpended as of June 30, 2003 and, therefore, not provided in 2002-03. Sciarra Cert. ¶14. As the Abbott Plaintiffs demonstrate below, by adding "provided" to the definition of maintenance, the DOE regulation clearly violates the Budget Order.

First, N.J.A.C. 6A:10-3.1(c) conflicts with plain language used by the Supreme Court in the Budget Order. The Budget Order contains an explicit, mandatory definition of "maintenance budget." As the Order states, "[a] maintenance budget shall mean that a district will be funded at a level such that the district can implement current [2002-03] approved programs, services, and positions." Budget Order, ¶2(emphasis added). In

addition, the Court reemphasizes this definition in directing DOE to notify districts of their maintenance budget figures:

Within 30 days of the issuance of this Order, the DOE shall provide in a Notice to each district preliminary maintenance budget figures for the 2003-04 school year consisting of the 2002-03 approved budget and the estimate of supplemental funding that will be needed to support that currently approved budget. Budget Order, ¶4(emphasis added).

The Budget Order, on its face, does not include the term "provided" within the definition of maintenance budget. Thus, there is simply no authority in that Order for the subsequent action taken by DOE: redefining maintenance in N.J.A.C. 6A:10-3.1(c) to exclude programs, services and positions that were previously approved but not provided as of June 30, 2003. See Abbott v. Burke, 163 N.J. 95, 105 (2000)("Abbott VI")(finding DOE implementation of Abbott preschool programs, including DOE regulatory and sub-regulatory guidance, "do[es] not conform" to the preschool mandates established in Abbott v. Burke, 153 N.J. 480 (1998)("Abbott V")); Abbott v. Burke, 170 N.J. 537 (2002)("Abbott VIII")(same).

Second, the only approved programs, services and positions that the Budget Order authorizes DOE to examine and exclude from the maintenance budget are "non-instructional programs" evaluated by DOE to be ineffective or inefficient. Budget Order, ¶3. Further, the Budget Order specifically defines "non-instructional programs" as only those that are "not school based

or directly serving students." Budget Order, ¶3. Thus, not only does the Court explicitly define maintenance budget, but it also expressly limits DOE authority to exclude from that budget only ineffective and inefficient "office/administrative expenditures." Budget Order, ¶3; Sciarra Cert., ¶14(explaining that DOE reduced school-based programs by \$47.9 million).

Third, the Budget Order explicitly limits DOE emergency regulatory authority pertaining to review of district 2003-04 budgets to "establishing the standard for evaluating the effectiveness and efficiency of the districts' non-instructional programs." Budget Order ¶3. There is nothing in the Order that could in any way be construed as authorizing DOE to redefine the maintenance budget so as to facilitate reductions in approved instructional programs, services and positions, or in approved non-instructional programs that are effective and efficient, as has resulted from the application of N.J.A.C. 6A:10-3.1(c). Sciarra Cert., ¶14, 17.

Fourth, the Budget Order must be viewed against the backdrop of the timing of that Order, and the urgency to resolve district budgets in time to implement all approved programs, services and positions in the 2003-04 school year. The expedited time frames within the Order for DOE review and preliminary determinations, and subsequent disposition of appeals, reflect the Court's intent to limit areas of potential

dispute to the narrow category of ineffective and inefficient central office expenditures. Thus, as the Order makes clear, all approved programs, services and positions that are school-based or directly serving students were to be automatically included in the maintenance budget, without regard to whether funds were expended for those items by June 30, 2003. See Abbott VIII, 170 N.J. at 543 (holding that decision-making and appeals on Abbott programs and budgets "in respect of programs for the next school year must be completed in time for implementation in the next school year if the process is to be meaningful").

Finally, there is no practical justification for the assumption underlying the "provided" language in N.J.A.C. 6A:10-3.1(c). Such language falsely assumes that any previously approved funding amount that is unexpended at the conclusion of the school year represents programs, services and positions that are no longer needed by the Abbott students and their schools. Sciarra Cert. ¶16 (explaining the variety of reasons why funds for needed programs may not be fully expended during the school year). Thus, the Court prohibited reductions in previously approved programs, services and positions through simple accounting measures. Rather, as discussed above, the Court first limited the budget areas subject to potential reduction, and then required the DOE to evaluate and provide evidence to

support such reductions under the effective and efficiency standard. Budget Order, at 4(finding that DOE, in reviewing budgets under its maintenance proposal, only "sought authority to evaluate Abbott programs. . .to determine whether those programs are effective and efficient").

In sum, the Supreme Court's definition of maintenance budget is clear and unequivocal: it must contain all approved expenditures, whether provided or not. There is simply no basis in the plain language and meaning of the Court's order to support DOE's drastic alteration of that definition in N.J.A.C. 6A:10-3.1(c). This Court should determine, therefore, that regulation is unconstitutional.

CONCLUSION

For the reasons set forth above, the Abbott Plaintiffs request that this Court (1) grant their Motion for Leave to Participate as Amicus Curiae, and (2) determine that N.J.A.C. 6A:10-3.1 violates the Abbott 2003-04 Budget Order and is, therefore, unconstitutional.

Respectfully submitted,

Education Law Center
Attorneys for Amicus Curiae
Abbott Plaintiffs

By: _____
David G. Sciarra

Dated: November 12, 2003